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11007—37

In the Supreme Court of the United States

OCTOBER TERM, 1937

No. —

UNITED STATES OF AMERICA, PETITIONER
v.
ILLINOIS CENTRAL RAILROAD COMPANY, A CORPORATION

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit in the above entitled case, entered on May 26, 1937.

OPINIONS BELOW

The trial court's findings of fact and conclusions of law appear at R. 22–24. The opinion of the Circuit Court of Appeals (R. 52) is reported in 90 F. (2d) 213.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered May 26, 1937. The jurisdiction of

this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether in an action for penalties under the Cruelty to Animals Act of June 29, 1906, Sections 1, 3, 4, as amended (U. S. C., Title 45, Sections 71, 73, 74), the carrier can escape the penalty by showing that its default was due to the negligent oversight of one of its employees.

STATUTE INVOLVED

The applicable portions of the pertinent statute will be found in Appendix, *infra,* pp. 11–13.

STATEMENT

This is a civil action brought by the United States of America, petitioner, against the Illinois Central Railroad Company, a corporation, hereinafter referred to as respondent, to recover a penalty of not less than $100 nor more than $500 under the Act of June 29, 1906, Chapter 3594, Sections 1, 3, and 4, 34 Stat. 608, as amended, Title 45 U. S. C., Sections 71, 73, and 74, commonly known as the Cruelty to Animals Act.

The petition (R. 2) alleges that respondent "knowingly and wilfully" confined cattle in a car between Hermanville, Mississippi, and New Orleans, Louisiana, for 37 hours without unloading them for rest, water, and feeding, and that respondent actually transported them from Jackson, Mississippi, to New Orleans, Louisiana, the transportation from Hermanville, Mississippi, to Jackson,

Mississippi, being by the Yazoo and Mississippi Valley Railroad Company.

Respondent, in its answer (R. 5), admitted the confinement for the period alleged in the petition (37 hours), but denied that it did so "knowingly and wilfully" and set up an affirmative defense (R. 7) that the confinement was the result of the negligence of its night general yard master at New Orleans, who had been advised by telegraph of the approximate time of arrival of this car of cattle and when the legal confinement period of the cattle would expire. Upon the petition and answer, petitioner moved for judgment (R. 9), which motion was overruled (R. 10).

The parties then entered into a stipulation of facts and waived trial by jury (R. 11). It was agreed, among other things, that the car was loaded with cattle at Hermanville, Mississippi, at 3 p. m. on October 8, 1932, and shipped to New Orleans, Louisiana, with a 36-hour release signed by the shipper (R. 12). This car arrived at Stuyvesant Stock Yards at 11:35 p. m. on October 9, 1932, with two other cars of cattle (R. 13). Respondent's night general yard master received advance information from respondent's dispatcher at McComb of the approximate time of arrival of these three cars and when the period of confinement for the cattle expired. Because of the necessity of prompt handling of the cattle and the improbability of handling it on regular trains, an extra engine and crew were procured and were in waiting for

the arrival of the cars of cattle. These cars were immediately switched and placed in the Crescent City Stock Yards for delivery at 2:50 a. m. on October 10, 1932, at which time the period allowed for the confinement of the cattle had not elapsed, and the car containing the cattle was placed for unloading within said period of time (R. 13–14).

It was further agreed that the night general yard master, knowing how long the cattle had already been confined, failed to notify the employee of the Illinois Central Railroad, whose duty it was to unload the car, that the cattle car was to be placed for delivery in the early hours of the morning, and because of this failure of the night general yard master, the car was not unloaded until 4 a. m. on the morning of October 10, 1932, the total period of confinement being 37 hours. It was the duty of the night general yard master, under the instructions of the Illinois Central Railroad Company, to notify the employee of that railroad as to when the cars would be placed for delivery (R. 14).

The case was submitted to the District Judge on the agreed statement of facts. Both parties filed requests for findings of fact and conclusions of law (R. 18). Petitioner moved for judgment and for findings of fact and conclusions of law (R. 18–21), which motion was denied (R. 25), reserving to petitioner a bill of exception to conclusions of law and findings of fact and each of them (R. 26). The court, on October 6, 1936, rendered judgment in favor of respondent (R. 27), dismissing the suit,

and making special findings of fact and conclusions of law requested by respondent (R. 22). The court found that respondent "attempted in good faith to comply with the statutory requirement to unload the cattle within the statutory period" (R. 22); that the failure to unload within the statutory period "was due to the negligent oversight of the night general yard master employed by the said defendant in failing to notify an employee of the Illinois Central Railroad Company to unload the said car of cattle within the statutory period" (R. 22–23). The court also found that respondent, through its proper employee, knew how long the animals had been confined (R. 23).

The court held as a conclusion of law that Section 1 of the Act (U. S. C., Title 45, Section 71) should not be read in pari materia with Section 3 of the Act (U. S. C., Title 45, Section 73). In other words, in order to determine whether the default of the carrier has been "knowingly and wilfully" committed under Section 3, the language of Section 1 cannot be considered (R. 23). The court also held that the "negligence of an employee * * *" is not equivalent to knowledge and wilfulness as required in Section 3 of the Act (R. 23–24).

An appeal was taken from the judgment of the District Court and on May 26, 1937, the Circuit Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the Fifth Circuit erred:

1. In holding that the failure of respondent to unload the cattle did not render it liable to the penalty where such failure was due to the oversight or negligence of its night general yard master to notify the appropriate employee to unload the cars.

2. In failing to hold that the negligence of respondent rendered it, as a matter of law, liable to the statutory penalty.

3. In affirming the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

1. In holding that the failure of respondent to unload the cattle did not render it liable to penalty, where such failure was due to the oversight or negligence of its night general yardmaster to notify its employee charged with the duty of unloading to unload the cattle, the decision of the court below is squarely in conflict with the decisions of the Circuit Court of Appeals for the Fourth Circuit in the case of *United States* v. *Atlantic Coast Line Railroad,* 173 Fed. 764, and the Circuit Court of Appeals for the Ninth Circuit in the cases of *Montana Cent. Ry. Company* v. *United States,* 164 Fed. 400, and *Oregon-Washington R. & Nav. Co.* v. *United States,* 205 Fed. 337. The decision appears also to be in conflict with that of the Circuit Court of Appeals for the Eighth Circuit in *United States* v. *Union Pac. R. Co.,* 169 Fed. 65 (C. C. A.

8th). On the other hand, the decision below does find support in decisions in the Third and Sixth Circuits. *United States* v. *Lehigh Valley R. Co.*, 204 Fed. 705 (C. C. A. 3d); *United States* v. *Southern Ry. Co.*, 1 F. (2d) 607 (D. C. E. D. Tenn.).

The conflict is hinged about the interpretation of the words "knowingly and wilfully" as used in the statute. Those courts that regard the statute as in the nature of a criminal one essentially require an evil or malevolent intent to be shown to enforce liability. It is to be noted, however, that Section 4 provides that the penalty created by the preceding section should be recovered by civil action. In *United States* v. *Atlantic Coast Line Railroad, supra,* regarding the statute involved in this case, the court stated (p. 767):

> It has been decided a number of times that the statute in question is not a criminal one, and that it should not be construed according to the strict rules by which courts are governed in criminal cases.

And so the court there held that negligence was no defense, stating (p. 769):

> It is well settled that a corporation can only act through its agents, and, such being the case, it necessarily follows that a lack of foresight and due diligence on the part of those acting as agents in complying with the statute is negligence. Therefore, in this instance, we think the corporation has, within the meaning of the statute, "knowingly" and "willfully" failed to comply with the law,

notwithstanding the fact that there may have been no evil motive or intent in the transaction. In other words, we think *a negligent failure to comply with the law, with a knowledge of facts as shown in this instance, is willful failure.* [Italics supplied.]

Similarly, in *Montana Cent. Ry. Company* v. *United States, supra,* it was held that "oversight, forgetfulness, and unintentional neglect" of the railroad's train dispatchers, contrary to its rules and orders, is no defense.[1]

2. The decision in the instant case renders the statute virtually inoperative. As a matter of fact, practically all the violations of the Twenty-eight Hour Law are due in the final analysis to negligence in one form or another of railroad employees rather than to any deliberate purpose to violate the Act. In *United States* v. *Union Pacific Railroad Com-*

[1] While, as shown above, there is a conflict of decisions, it may be observed that a number of the decisions cited by the court below do not support its conclusion. In *Oregon-Washington Railroad and Navigation Co.* v. *United States,* 265 Fed. 337 (C. C. A. 9th), where the facts were substantially the same as in the instant case, the court held that they were indicative of a violation of the Act. In *Chicago, B. and Q. R. R.* v. *United States,* 194 Fed. 342 (C. C. A. 8th) there was no evidence of negligence. In *St. Joseph Stockyards Co.* v. *United States,* 187 Fed. 104 (C. C. A. 8th), the question of negligence was not involved. *United States* v. *Boston & M. R. R. Co.,* 84 F. (2d) 365 (C. C. A. 1st), was decided on a procedural question. In *St. Louis & S. F. R. Co.* v. *United States,* 169 Fed. 69 (C. C. A. 8th), and in *Merchants Bridge Terminal Ry. Co.* v. *United States,* 209 Fed. 600 (C. C. A. 7th), it was held there was not sufficient evidence to support the finding of lack of diligence on the part of the carrier.

pany, 169 Fed. 65, *supra,* at page 68, the court stated:

> It can hardly be conceived that any reputable carrier would deliberately and designedly because of ill will or other malevolent feeling towards the dumb animals or their owners fail to conform to the reasonable and humane requirement of the law. If the law be operative only to restrain the possible exercise of such evil and perverse disposition, it would have little, if any, scope of operation. The real purpose of the legislation in our opinion was to alleviate the condition of dumb animals in transit. The desire to curtail expense and promote economy of operation naturally encourages indifference to if not a disregard of every impediment to quick and cheap transportation. The Act of June 29, 1906, we think, was aimed at this natural propensity, and is a condemnation of indifferent more than malevolent conduct. So far as the dumb animals are concerned, the effect is the same in either case. They would suffer just as much if deprived of rest, water, and food by indifference of the carrier as they would by his malevolence. The meaning we ascribe to the word "willfully" gives a reasonable scope of operation to the act, while the meaning contended for by defendant's counsel practically nullifies it.

The foregoing reasoning applies to conduct which reflects negligence as well as to that which reflects indifference.

The question involved is one of importance to the Government. Effective enforcement of the Twenty-eight Hour Law depends on a resolution of the conflict in its construction. There are several cases pending in the Eastern District of Louisiana in which negligence has been offered as an affirmative defense. These cases are now awaiting final determination of this question. The construction given the word "willfully" by the court below, if universally adopted, would make it impossible to punish any overconfinement due to negligence, which in the last analysis is the cause of these violations. For this reason the construction of the statute should be authoritatively settled by this Court.

Wherefore it is respectfully submitted that the petition should be granted.

STANLEY REED,
Solicitor General.

AUGUST 1937.

APPENDIX

UNITED STATES CODE, TITLE 45, ACT OF JUNE 25, 1906, C. 3594, SECS. 1, 3, 5, 34 STAT. 607, AS AMENDED

SECTION 71. No railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, whose road forms any part of a line of road over which cattle, sheep, swine, or other animals shall be conveyed from one State or Territory or the District of Columbia into or through another State or Territory or the District of Columbia, or the owners or masters of steam, sailing, or other vessels carrying or transporting cattle, sheep, swine, or other animals from one State or Territory or the District of Columbia into or through another State or Territory or the District of Columbia, shall confine the same in cars, boats, or vessels of any description for a period longer than twenty-eight consecutive hours without unloading the same in a humane manner, into properly equipped pens, for rest, water, and feeding, for a period of at least five consecutive hours, unless prevented by storm or by other accidental or unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight: *Provided,* That upon the written request of the owner or person in custody of that particular shipment, which written request shall be separate and apart from any

printed bill of lading, or other railroad form, the time of confinement may be extended to thirty-six hours. In estimating such confinement, the time consumed in loading and unloading shall not be considered, but the time during which the animals have been confined without such rest or food or water on connecting roads shall be included, it being the intent of this chapter to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon the contingencies hereinbefore stated: *Provided,* That it shall not be required that sheep be unloaded in the nighttime, but where the time expires in the nighttime in case of sheep the same may continue in transit to a suitable place for unloading, subject to the aforesaid limitation of thirty-six hours.

SECTION 72. Animals so unloaded shall be properly fed and watered during such rest either by the owner or person having the custody thereof, or in case of his default in so doing, then by the railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, or by the owners or masters of boats or vessels transporting the same, at the reasonable expense of the owner or person in custody thereof, and such railroad, express company, car company, common carrier other than by water, receiver, trustee, or lessee of any of them, owners or masters, shall in such case have a lien upon such animals for food, care, and custody furnished, collectible at their destination in the same manner as the transportation charges are collected, and shall not be liable for any detention of such animals, when such detention is of reasonable duration, to enable compliance with section 71 of this chapter,

but nothing in this section shall be construed to prevent the owner or shipper of animals from furnishing food therefor, if he so desires.

SECTION 73. Any railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, or the master or owner of any steam, sailing, or other vessel who knowingly and willfully fails to comply with the provisions of the two preceding sections shall for every such failure be liable for and forfeit and pay a penalty of not less than $100 nor more than $500: *Provided,* That when animals are carried in cars, boats, or other vessels in which they can and do have proper food, water, space, and opportunity to rest the provisions in regard to their being unloaded shall not apply.

SECTION 74. The penalty created by the preceding section shall be recovered by civil action in the name of the United States in the district court holden within the district where the violation may have been committed or the person or corporation resides or carries on business; and it shall be the duty of United States Attorneys to prosecute all violations of this chapter reported by the Secretary of Agriculture, or which come to their notice or knowledge by other means.

U. S. GOVERNMENT PRINTING OFFICE: 1937